

February
(*January* 24. 1742.)

INFORMATION to the Honou-
rable Baillies of *Edinburgh*, for *An-*
drew Jamieson Merchant in *Edin-*
burgh, Defender;

AGAINST

William Montgomery one of the Clerks
of the Custom-house of *Edinburgh*,
Pursuer.

THE said *William Montgomery*, being Debitor to me
in considerable Sums by Bills and promissory Notes,
did on the 10th of *August* 1741, toward my Pay-
ment, indorse me a Bill of 70 L. *Sterling*, acce-
pted by *James Jamieson* Merchant in *Dundee*, payable to *Ar-*
thur Stark the 27th of the said Month, and indorsed by him
to the said *William Montgomery*; and, on the said 10th of *Au-*
gust, took my Receipt of the said Bill, bearing, *That I should*
hold Count for the same when paid me.

Notwithstanding that the said 70 L. Bill was not payable
till the said 27th of *August*, yet I was content to hold the same
as Cash, being sure of my Payment, having not only *Jamieson*
the Acceptor (who was in good Circumstances) bound, but
likewise Messieurs *Stark* and *Montgomery* liable to me in Re-
course in case he had failed. And therefore I, being anxiously
desirous to have Matters brought to a Clearance betwixt Mr.
Montgomery and me, did, on the 21st of the said Month of *Au-*
gust, deliver up to him Six Bills or Notes, amounting to
127 L. 12 sb. 6½ d. in Payment whereof I got Allowance of
the said 70 L. Bill, and a Bill accepted by Mr. *Montgomery* to
me of that Date for 57 L. 12 sb. 5½ d. *Sterling*, being the Ba-
lance, and which was payable one Day after Date.

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At this Time I unluckily neglected to get up the Receipt of the 70 L. Bill; and indeed I have fallen into such Escapes at other Times, but never happened to suffer thereby: Particularly, about a Year ago, I paid a Bill of 100 L. *Sterling* to *William Mercer* Merchant in *Edinburgh*, and omitted to take up my Bill; and about *June* last I happened to pay about 40 L. *Sterling* to the Bank, and neglected to take up my Receipt; who however both did me Justice, and delivered up the Bills or Receipt the first Occasion.

But Mr. *Montgomery* is disposed, it seems, to take an undue Advantage of my foresaid Inadvertance; for, to my Surprise, he caused intent a Process against me in *December* last, to account to him for the Bill of 70 L. whereof I had received Payment in *September* preceeding: And, as he was possess'd of a written Document against me, I behoved to defend myself against this Claim of double Payment by such Presumptions and Circumstances as Providence favours me with; and indeed the Court has been at sufficient Pains in allowing all Means for bringing the Truth to Light, it being evident that one or other of the Parties must be egregiously in the Wrong. And, when the whole Circumstances of this Case are laid together and duly weigh'd, I can hardly doubt the Court and impartial World will be fully convinced that this Demand is most groundless and unjustifiable.

In the *first* Place, then, Your Honours have seen Jottings of Bills and Notes on a Piece of Paper wrote by Mr. *Montgomery's* own Hand, summ'd up by him to 127 L. 10 *sh.* 6½ *d.* but erroneously: For the Particulars prefix'd, when duly calculated, amount to 127 L. 12 *sh.* 6½ *d.* and, by deducing the 70 L. Bill in question out of that Sum, there exactly remains 57 L. 12 *sh.* 6½ *d.* the Sum in the Bill accepted by the said Mr. *Montgomery* the 21st of *August* last, all to the Trifle of a Penny.

Does not the Truth here forcibly strike the Eye? If the 70 L. Bill had not been accounted for, 'tis hardly possible with-
out



out a Miracle that the Sum in the Bill for the Balance should, together with that 70 L. 12 *sh.* exactly answer to the 127 L. 12 *sh.* which was the Charge against Mr. *Montgomery*, arising from the particular Notes and Bills aforesaid delivered up to him of that Date.

Mr. *Montgomery* the Pursuer was put to confess or deny, whether the Jottings of the particular Bills, and Summing them up to 127 L. 10 *sh.* 6½ *d.* was his own Hand-writing? And, in his Letter to Mr. *Deuchar* his Procurator, he acknowledges, "That the holograph Paper, which I produced against him by way of Charge for 127 L. 10 *sh.* 6½ *d.* Sterling, he discharged, to the best of his Remembrance, by giving me up two Bills, the one of 15 L. Sterling, and another of 17 L. Sterling or thereabouts, and granted me a Bill for 57 L. odd Money Sterling, and Cash for the rest; and at that Time got up the Bills and Notes therein-mentioned."

Since the Pursuer owns that the Jotting was his own Hand-writing, and that he got up the Bills and Notes therein-mentioned amounting to the said Sum, the Argument is conclusive against him, That I had given him Credit for the 70 L. Bill, since the Balance for which he accepted a Bill to me so exactly answers the 127 L. 12 *sh.* after Allowance of the said 70 L. Nor can the Addition which he makes as to the Method of clearing be regarded; that Particular was not put to him, and 'tis quite extrinseck to the Point whereon he was to confess or deny.

And indeed it seems impossible that his Account of the Matter can gain Credit with any thinking Person: For, can any Mortal believe that the Pursuer would be paying to me in Cash 38 L. Sterling (which is his Account of the Matter) and give me his Bill for 57 L. 12 *sh.* payable the very next Day, if within Six Days after this Accounting he had a Demand upon me for the 70 L. upon the Receipt he now founds upon of *Jamieson's* Bill? It passes all Credibility, that any Man of common

Sense, tho' he had never so great Affluence of Money, would have acted in that Manner.

And next, as to the two Bills he pretends he had of me, and delivered up in Part Payment of the 127 L. 12 *sh.* he in his Declaration before your Honours says, That they were dated a Month before the Clearance, which brings it to *July* 1741. Now, one of the Notes I delivered him up at the foresaid Clearance is dated 25th *Ditto* for 60 L. *Sterling*, which he accepted to me upon my drawing a Bill of the same Date upon Mr. *William Alexander*, and which he received, as appears from the same and his Receipt thereon now produced; and on the First of said Month he accepted another Bill to me for 8 L. and on the Ninth another Bill for 13 L. 2 *sh.* all which Bills were Part of those delivered up to him at the foresaid Clearance 21st *August* last, and which would appear if he produced the same; But he is pleased in his foresaid Declaration not to own that he has them.

But, as to the 60 L. Bill, 'tis evident from my Bill on Mr. *Alexander* payable to him for that Sum, that he must have either got from me 60 L. in ready Money, or accepted a Bill to me for the same; either of which quite discredits his Account of the Matter, that about this Time I was borrowing Money from him, and accepting Bills for the same.

Another strong Adminicle that the 70 L. Bill in my Receipt was accounted for at the Clearance 21st *August* last, is a missive Letter sent by me to the Pursuer the Seventeenth of said Month, subjoined to a Note of Bills and other Debts owing by him to me; and wherein I give him Credit, among other Things, for the 70 L. Bill accepted by *James Jamieson*. And the short Missive I subjoin is, *Sir, I want to settle the above Account, and oblige your humble Servant.*

This demonstrates that the Counting on *Jamieson's* Bill was no sudden Thought, that it was before-hand determined on by both Parties; and there was nothing could occur betwixt the 17th and 21st *August* that could give Occasion to our departing from that

that Plan, and therefore it cannot be doubted but we prosecuted the same at our Clearance.

In the 3^d Place, The Pursuer on the 30th *September* 1741, after I received Payment of most of *Jamieson's* Bill, makes Payment to me of 26 L. 12 *sh.* 5 *d.* $\frac{1}{2}$ of the said Bill of 57 L. 12 *sh.* by indorsing to me a Bill of *William Rowleigh's* for that Sum, and which he caused mark on the Back of the Bill in Part Payment of the said Sum: And in this very Libel he acknowledges the same in so many Words, tho' he has been pleased afterwards to deny that *Rowleigh's* Bill was indorsed to me in Part Payment of his Bill to me of 57 L. 12 *sh.*

Again, on the 20th *October* 9 L. 3 *d.* more was paid to me by the Pursuer of the said Bill of 57 L. 12 *sh.* and marked on the Back thereof.

How can it be thought that the Pursuer would be making these partial Payments of the 57 L. 12 *sh.* Bill, if at the same Time I had been Debtor to him of the 70 L. for which by my Receipt I was to hold count? He would certainly, on that Supposition, have intirely suspended the Payment of the Bill of 57 L. 12 *sh.* till I had accounted, instead of making partial Payments, thereof. And this Conduct evinces that he was conscious I had already accounted; and indeed it was when I threatned Diligence, that he indorsed *Rowleigh's* Bill in Part-payment. And it is wrong to alledge, that these Markings appear to have been done at one and the same Time; for the last is with a much fresher Ink than the other, as is clear from Inspection.

As another Circumstance which affords no small Light into this Matter, your Honours will please know, that *Arthur Stark*, original Creditor in the 70 L. Bill, on the 8th *August* last draws a Bill on Mr. *Montgomery* payable to me three Days after Date, for 20 L. 17 *sh.* 11 $\frac{1}{2}$ *d.* *Sterling*, which was accepted; and this is one of the Bills which made up the 127 L. 12 *sh.* and with the rest was delivered up to the Pursuer at the Clearance the said 21st *August*.

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Now, is it possible to imagine, that the Pursuer, when he was making Payment of this Bill on *Stark's* Draught, would not have likewise counted with me for the 70 *L.* in *James Jamieson's* Bill payable to *Stark*? or, can any Person believe that he would pay this 20 *L.* 17 *sh.* 11 $\frac{1}{2}$ *d.* to me on *Stark's* Draught, if I had been Debitor to him in the 70 *L.* contained in the Bill to *Stark*, for which I granted Receipt, at least was to become Debitor for the same in a few Days?

The Force of this Argument was, I doubt not, apprehended by the Pursuer, when, upon his foresaid Examination, he denies that this 20 *L.* 17 *sh.* 11 $\frac{1}{2}$ *d.* Bill of *Stark's* Draught was one of these counted on and delivered up 21st *August*, and pretends that it was presented to him, and that he paid it forthwith in ready Money. But as the Thing is improbable, that he would be paying ready Money to me, if I was his Debitor by my Receipt; so it is self-evident, that this Bill is one of those counted on and delivered up at that Clearance: It answers to a Farthing, the Sum in one of these Bills stated in the Jotting, is said to be 20 *L.* 17 *sh.* 11 $\frac{1}{2}$ *d.* the very Sum in *Stark's* foresaid Bill which he has produced in Process.

Another Particular worth noticing, and which indeed of itself brings Conviction, is, That, on 27th *November* last, some few Days before Mr. *Montgomery* intented this Action, he applies to me in relation to the Bill for 57 *L.* 12 *sh.* 5 *d.* I had of him; and protests under Form of Instrument, That I should not indorse the same away, in respect that there is 9 *L.* 3 *sh.* of it paid, and that he had my Obligation for 15 *L.* or thereby: That he had indorsed to me *Rowleigh's* Bill for 26 *L.* and that I was Debitor to him in great Sums arising from the Profits of a Contract entred into betwixt him and me, in relation to the Benefit of Purchases of condemned Goods in Exchequer, which would exhaust the Contents of the Bill; and therefore required that I should not indorse or assign the same, or otherwise be liable to him in all Cost and Damage.

Now it can hardly be thought, that the Pursuer would in this
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Instrument have founded upon an illiquid Claim of Profits arising from the foresaid alledged Contract to bar my indorsing his Bill, if he had had a well-founded Claim to the 70 L. for which I became accountable to him by my Receipt now under Consideration; it seems unavoidable that he had taken up no Thought of his Claim on this Receipt at this Time: And indeed in common Justice, and out of Regard to his own Character and Reputation, he ought never to have made it.

'Tis humbly thought there is convincing Evidence, that the Pursuer's Demand on my Receipt to account to him for this great Sum is groundless and unjust, unless the Pursuer has Counter-adminicles to take off the Presumptions that ly against him; but he advances nothing on that Head that can remove the same, as will appear upon Examination.

And, in the *first* Place, what he most founds on is, " That the Jottings of his Hand-writing of the particular Bills and Notes, and summing up the same, are upon a Quarter of a Sheet of Paper, and is called the Charge; and that it has had another Quarter where the Discharge was placed, and which he pretends I have abstracted to conceal the same: And that, if it did appear, it would support what he affirms in his *Mis-* five to Mr. *Deuchar*, as to his Manner of accounting for the Charge against him of 127 L. 12 *sh.* And this he further urges from the Title of the Account, which is imperfect, bearing, *Account betwixt Andrew Jamieson Merch:*"

But, for all the Pursuer's Vaunting on this Head, it can signify nothing, when duly enquired into. The very Circumstance, which he objects to make the Account imperfect, shows that it never was nor intended to be more perfect, I mean the Title; for it does not at all end as if it had been to be fully express'd: For there is a Colon after the last mank Word *Merch:* which, if the Title had been written out on the other Side, could not possibly be; for it would be a Colon in the Middle of a Word. So that this might serve as a full Answer.

The Title as well as the Jottings are the Pursuer's Hand-writing

writing: And, if he made the Title Nonsense, he must answer for it; but that cannot detract Credit from the Jottings, which make up the Charge against him. And I have declared, and am ready to swear, That it was in the same Condition as it is at this Day when I put it up at the foresaid Clearance 21st August.

And that this Paper had no Discharge opposite to it is further cleared by the Pursuer's own Missive touching the same, whereof the Tenor is above set down. He owns the Jottings to be his Hand-writing, and that they contained the Charge against him of Bills and Notes, amounting to 127 L. 10 *sh.* 6 $\frac{1}{2}$ *d.* but does not pretend that there had been any Discharge opposite to it, to take the same off; but endeavours to do it from his Memory, in a Way which I altogether deny, and improbable of itself, as above. Now, if this Paper had truly consisted of two Leaves, whereof one is now taken away, Would not the Pursuer have naturally suggested it at this Time? and his not doing so, is Demonstration that he was then convinced that there was no such Thing, and that his present Allegation is an After-thought of his Counsellors.

It is likewise said, "That these Jottings are upon gilt Paper, and that I have acknowledged in my Declaration, that I did not use to draw out Accounts on such Paper," as indeed I believe no Body else does.

But the Observation is trifling; for this was only Jottings, and not intended for a stated Account. When the Sum in the Charge arising from the several Notes and Bills due to me by the Pursuer was ascertained to 127 L. 12 *sh.* the whole Matter was in effect done; for all that remained was to deduce the 70 L. Bill in my Receipt from that Sum, and to grant me the Bill of 57 L. 12 *sh.* for the Balance; and whether this were done upon the Back of a Letter, upon gilt or mourning Paper, or whatever came first to Hand, out of my Pocket or his, was not material; and indeed it is most probable it came from Mr. *Montgomery*, such Kind of Paper being much used in the Custom-house.

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And what ought to stop the Pursuer's Mouth on this Head is, that, when he was upon Examination before your Honours touching this Matter, you were pleased, at my Request, to send your Clerk along with him and me to his Desk or Scrutore in the Custom-house, where I alledged there would be found sufficient Evidence that there was Credit given him at the Clearance 21st *August* for the 70 *L.* in question; and to this the Pursuer at first consented, and went along with the Clerk and me; and the Door of the Room where the Desk stood being locked, he went off from us, on Pretence to find his Servant to get the Key of the Room: But, instead of returning with it, he applied to his Lawier for Advice, and reported to the Court, that he was dissuaded by his Lawier to allow any summary Inspection of his Scrutore; but that, if I condescended upon any particular Writs, he would exhibite them upon Oath.

What Construction can the World or your Honours put upon this Conduct, other than that the Pursuer was using Shifts to conceal or abstract the Evidence? The Condescendence of a particular Writ was sufficiently made, by describing the same as a Writing that would make appear that the 70 *L.* in *James Jamieson's* Bill was accounted for: And, if the Pursuer had not been conscious that there was such a Writing in his Possession, he would not have declined a summary Inspection, in order to a Scrutiny. This was suppressing the Evidence with a Witness, and must make every Circumstance be construed against him in order to my Defence.

This Incident happened on the 5th Instant, upon the Pursuer's first Examination, and is fully contained in the Minute signed by your Honours and him of that Date. And it must be noticed, that, at Eight a-Clock the same Night, the Pursuer went into his Desk, and took out a Count-book, as he acknowledges upon his second Examination on the 8th Instant; and what Writings in relation to this Matter he might have secreted he knows best himself, but *peffimum prasumitur* against him for declining the Scrutiny.

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The Pursuer, at his Examination, denied that ever he had seen the Account and short Missive thereto subjoined the 17th of *August*. But then, by good Providence, the Pursuer had jotted some Figures upon the Foot of this Paper which contains the Account and Letter: As to which his Answer was, "That, if the Figures on the Foot of the said Missive had not been placed there, he would have taken them to have been Figures of his own writing. As they are upon the Foot of the said Missive which he never did see, the Declarant believes they were none of his writing."

It can hardly be said, the Pursuer denies these Figures to be his Hand-writing; and from comparing other Figures which are unquestionably of his writing, and by Persons that are well acquainted with his Hand, it will be clearly made out, that these Figures are of his writing: And consequently, that he could not but have seen and had in his Possession the foresaid Account and Missive on the same Paper.

'Tis likewise contended for the Pursuer, "That the 70 L. Bill, for which I grant Receipt, could not come into the Counting on 21st *August*, because it was not payable till the 27th *Ditto*."

But this has been already obviated in the Entry. Nothing could hinder me to hold the Money in this Bill as Cash, and to account for the same: And it was my great Interest so to do; for to be sure the Security by this Bill, which included Mr. *Montgomery* as the Indorser as well as *James Jamieson* the Acceptor, and *Stark* the Indorser to Mr. *Montgomery*, was more to be relied on than Mr. *Montgomery's* single Bills, which he owns I delivered him up at this Clearance.

The Pursuer's varying in several Particulars relating to this Affair cannot escape Notice. Your Honours will have observed the Pursuer's Conduct with reference to *Stark's* Bill of 20 L. 17 *sh.* 11 *d.* and the like is to be found in an other Particular in his Examination: For when it was put to him, If he had demanded up *Rowleigh's* Bill, upon his giving me Security? he denies it; and

and yet the very next Interrogator being, " Upon Refusal (to deliver up Rowleigh's Bill) did the Pursuer and Defender afterward meet, and the Pursuer told the Defender, that he had two Receipts of his, by which he would make him repent not delivering up Rowleigh's Bill? His Answer is, That he remembers of the Facts therein set down." How this is reconcilable to his Answer to the preceeding Interrogator, your Honours will judge: But I have sufficiently felt the Effect of his Threats as to one of the Receipts, viz. that whereon he now pursues; but am hopeful you will prevent my further suffering thereby.

And is it not plain from this one Circumstance which happened in November last, some Days before this Prosecution, that he was conscious to himself he was going to do a bad Thing? For, if the 70 L. in my Receipt was justly due, how could it be said, that he would make me repent it, or give me any Pain, by obliging me to account for the same; for to be sure, if I had not accounted for it before, it had been doing me a Pleasure to take the Money off my Hand?

What I here insist for is not an extraordinary Thing, viz. to take away Writ by Presumptions and Circumstances: It has been frequently done by the Lords of Session, and very lately within these few Weeks. In a Process at the Instance of *John Hamilton* against *Walter Neilson*, for Payment of a Bill of 600 Merks accepted by *Neilson* to him in December 1726, and of another Bill of 70 L. Sterling accepted by him in April 1728; the Lords assolized the Defender from the Process as to both Bills, tho' they were most formal, and nothing in Writ to take them away; but various Circumstances occurred, which afforded a sufficient Ground of Belief that they were not outstanding Debts.

And your Honours will remember the late famous Case, in the Process betwixt *Thomas Eliot* and *Archibald Cockburn*; where the Lords found a Note of 200 L. Sterling, granted by *Cockburn* to *Eliot*, taken away by mere Presumptions; and they found

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found *Eliot* the Pursuer liable in large Damages and Expences; And these Judgments were affirmed in the last Resort, with Costs. The Matter was recent, and betwixt the Parties themselves, as the Case is here. Innumerable Instances of the like Kind might be adduced, but 'tis needless to enlarge: The established Law is, That an Obligation in Writing may be found extinguished, paid or taken away, by Presumptions; and which is strongly founded in the Nature of Things. The Circumstances that found Presumptions are not liable to the Suspicion of Forgery, as the Discharge of an Obligation may be.

I humbly think, there never happened a Case where there occurred more Presumptions against any Claim whatever founded on Writ, than there do in the Pursuer's Demand on my Receipt or Obligation to account for the 70 L. in *James Jamieson's* Bill to *Stark* indorsed by the Pursuer to me: And as from the very Tenor of this Obligation, to *hold Count*, it appears to have been intended, that at the first Counting he should get Allowance of the same; so 'tis plain, that, at our Clearance 21st *August*, I gave him Credit for the whole Sum of 70 L. And it were to subject me to double Payment, to find me liable to the Pursuer in this Process.

In respect whereof, 'tis hoped your Honours, upon advising the whole Matter, and various Circumstances of the Case, will have no Difficulty to sustain my Defence, and assolvie me from this groundless and vexatious Claim.

AND. M'DOUALL.



